Supreme Court, U.S.
FILED
JAN 7 - 2004
OFFICE OF THE CLERK

(4)

No. 03-741

IN THE

Supreme Court of the United States

Hwang Geum Joo, Yuan Zhulin, Lola Tomasa Salinog, Liu Huang A-tau, Kim Boon-sun, Kim Sang Hee, Kim Soon-Duk, Yi Yong Nyo, Kim Bok-Dong, Lu Xiuzhen, Guo Yaying, Zhu Qiaomei, Prescila Bartonico, Narcisa Claveria, Maxima Regala de la Cruz, on behalf of themselves and all others similarly situated,

Petitioners,

v.

Government of Japan,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Michael D. Hausfeld (*Counsel of Record)*
Richard A. Koffman
Agnieszka M. Fryszman
COHEN MILSTEIN HAUSFELD & TOLL, P.L.L.C.
1100 New York Avenue, N.W., Suite 500
Washington, D.C. 20005
(202) 408-4600

Counsel for Petitioners (additional counsel on inside cover)

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

Additional Counsel for Appellants:

Barry A. Fisher
David Grosz
FLEISHMAN & FISHER
1888 Century Park East
Suite 1750
Los Angeles, CA 90067

Bill Lann Lee
Morris A. Ratner
Scott Nealey
LIEFF CABRASER HEIMANN & BERNSTEIN
275 Battery Street, 30th Floor
San Francisco, CA 94111-3339

David R. Markham
BLUMENTHAL OSTROFF & MARKHAM
2255 Calle Clara
La Jolla, CA 92037

Kenneth T. Haan
HAAN & RYU, L.L.P.
3699 Wilshire Boulevard
Suite 860
Los Angeles, CA 90010

Keith K. Kim
LAW OFFICES OF KEITH KIM
3699 Wilshire Boulevard
Suite 635
Los Angeles, CA 90010

Johnnie L. Cochran, Jr.
LAW OFFICES OF JOHNNIE L. COCHRAN, JR.
Woolworth Building
233 Broadway
New York, NY 10279

TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii - iv

INTRODUCTION 1

I. RESPONDENT CANNOT PERSUASIVELY DISTINGUISH *ALTMANN* 2

II. RESPONDENT MISCHARACTERIZES, AND FAILS TO ADDRESS, THE SECOND QUESTION PRESENTED BY PETITIONERS 6

III. THE COURT SHOULD DECLINE RESPONDENT'S INVITATION TO REACH ISSUES NOT ADDRESSED BY THE COURT OF APPEALS 8

CONCLUSION 9

TABLE OF AUTHORITIES

FEDERAL CASES

Abrams v. Société Nationale des Chemins de Fer Français,
332 F. 3d 173 (2d Cir. 2003) 7, 8

Altmann v. Republic of Austria,
317 F.3d 954 (9th Cir. 2002), *cert. granted*,
124 S. Ct. 46 (Sept.30, 2003) ..... *passim*

Bernstein v. N.V. Nederlandsche-Amerikaansche,
210 F.2d 375 (2d Cir.1954) 4

Flores v. Southern Peru Copper Corp.,
343 F.3d 140 (2d Cir. 2003) 3, 9

Flota Maritima Browning de Cuba, S.A. v. Motor Vessel Ciudad de la Habana,
335 F.2d 619 (4th Cir.1964) 7

Hughes Aircraft Co. v. United States,
520 U.S. 939 (1997) 9

Johnson v. Eisentrager,
399 U.S. 763 (1950) 7

Pierce County v. Guillen,
537 U.S. 129 (2003) 9

Princz v. Federal Republic of Germany,
26 F.3d 1166 (D.C. Cir. 1994) 7

Republic of Mexico v. Hoffman,
324 U.S. 30 (1945) 7

Ex parte Republic of Peru,
318 U.S. 578 (1943) 7

The Schooner Exchange v. M'Faddon,
11 U.S. 116 (1812) 6, 7

United States v. Yousef,
327 F.3d 56 (2d Cir.), *cert. denied*,
124 S. Ct. 353, 492 (2003) 3, 9

Verlinden B.V. v. Central Bank of Nigeria,
461 U.S. 480 (1983) 7

FEDERAL STATUTES

Foreign Sovereign Immunities Act of 1976 ("FSIA"),
28 U.S.C. §§ 1601-11 . . . . . *passim*

Victims of Trafficking and Violence Protection Act of 2000,
22 U.S.C. §7101 9

White Slave Traffic (Mann) Act,
Pub. L. No. 277, § 395, 36 Stat. 825(1910) 9

ADDITIONAL AUTHORITIES

1951 Treaty of Peace with Japan 2, 3, 8

8 Dep't State Bull. 21 (Jan. 9, 1943) 5

5 Dep't State Bull. 476 (Dec. 13, 1941) 5

5 Dep't State Bull. 470 (Dec. 13, 1941) 5

6 Dep't State Bull. 123 (Feb. 6, 1942) 5

6 Dep't State Bull. 169 (Feb. 21, 1942) 5

8 Dep't State Bull. 49-55 (Jan. 16, 1943) 5

8 Dep't State Bull. 337 (Apr. 24, 1943) 5

10 Dep't State Bull. 115 (Jan. 29, 1944) 5

10 Dep't State Bull. 277 (Mar. 25, 1944) 5

10 Dep't State Bull. 340 (Apr. 15, 1944) 5

10 Dep't State Bull. 342 (Apr. 15, 1944) 5

International Convention for the Suppression of the White Slave Traffic, May 4, 1910 9

Paris Reparations Agreement of 1946 3

Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25 Annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, at Art. 3 (2001) 9

INTRODUCTION

As demonstrated in the Petition for Certiorari, the decision below conflicts with this Court's retroactivity jurisprudence. *See* Petition at 4-12. Respondent's attempt to explain away this conflict does not require any reply beyond the discussion set forth in the Petition.

Respondent also seeks to distinguish this case from the Ninth Circuit's contrary decision in *Altmann v. Republic of Austria,* 317 F.3d 954 (9th Cir. 2002), *cert. granted,* 124 S. Ct. 46 (Sept. 30, 2003). As demonstrated below, none of the distinctions proffered by Respondent is valid, and the Court should grant the Petition to reconcile the conflict between the Ninth and District of Columbia Circuits regarding the retroactivity of the exceptions to sovereign immunity set forth in section 1605(a) of the FSIA.

Respondent fails to address the second question presented in the Petition, choosing instead to answer an entirely different question. Respondent's failure to address the second question presented in the Petition should be deemed an acknowledgment that this important and unresolved question of law warrants the Court's review.

Finally, Respondent urges the Court to affirm the judgment below on various bases not addressed by the court of appeals. Respondent, however, suggests no reason why the Court should abandon its usual practice of declining to reach questions not addressed by the court below. Respondent's invitation to address these issues prior to their resolution by the court of appeals should be rejected.

I. RESPONDENT CANNOT PERSUASIVELY DISTINGUISH *ALTMANN*.

In *Altmann*, the Ninth Circuit held that "application of the FSIA to the pre-1952 actions of the Republic of Austria is not impermissibly retroactive." 317 F.3d at 967.[1] Here, conversely, the court below held that "the commercial activity exception to the FSIA does not apply retroactively to events, such as those alleged in this case, occurring before May 19, 1952." App. 16a. These two decisions plainly conflict, unless one excepts the rather bizarre proposition that the FSIA's expropriation exception to sovereign immunity, set forth at 28 U.S.C. § 1605(a)(3), applies retroactively, while the FSIA's commercial activity exception to sovereign immunity, set forth at 28 U.S.C. § 1605(a)(2), does not. Respondent offers three purported distinctions of *Altmann*, each of which is unavailing.

1. Respondent first purports to distinguish *Altmann* based on the 1951 Treaty with Japan. *See* Brief in Opposition at 16. This purported distinction fails for at least three reasons. First, as Respondent concedes, the United States entered into a series of post-World War II treaties with Germany and Austria that, like the Treaty with Japan, provided for reparation claims of signatory nations to be

---

[1]This Court granted certiorari in *Altmann* on the question, "Does the expropriation exception of the [FSIA] afford jurisdiction over claims against foreign states based on conduct that occurred before the United States adopted the restrictive theory of sovereign immunity in 1952?"

resolved through government-to-government negotiations.[2] *See* Brief in Opposition at 17. There is thus no relevant distinction between the Treaty with Japan and the treaties with Germany and Austria.

Second, like all treaties, the 1951 Treaty with Japan can extinguish only the claims of citizens of signatory nations. *See Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 162 (2d Cir. 2003); *United States v. Yousef*, 327 F.3d 56, 95 n.28 (2d Cir.), *cert. denied*, 124 S.Ct. 353, 492 (2003). Neither Korea nor China was a party to that Treaty, and most of the Petitioners are citizens of these countries.

Third, even if the 1951 Treaty could somehow affect Japan's settled expectations regarding claims by citizens of non-signatory nations – a dubious proposition at best – it

---

[2] Both parties agree that the court below's conjecture that "there was no similar treaty with Germany or Austria," App. 11a, was mistaken. Respondent's contention that none of the treaties with Germany and Austria waived the claims of the signatories and their nationals is similarly mistaken. For example, Article 2A of the Paris Reparations Agreement of 1946, regarding reparations by the former Nazi powers, contains such a waiver: "The Signatory Governments agree among themselves that their respective shares of reparation, as determined by the present Agreement, shall be regarded by each of them as covering all its claims and those of its nationals . . . ." In its Brief for Amicus Curiae Japan in Support of Petitioners, at 25, n.5, *Republic of Austria v. Altmann*, 03-13 (Nov. 2003), Respondent argues that the 1951 treaty with Japan and the treaties with Germany and Austria operate in a similar fashion, contradicting its argument here.

could conceivably have affected such expectations only from September 8, 1951, when it was signed, until May 19, 1952, when the United States adopted the restrictive theory of sovereign immunity later codified in the FSIA. Japan's expectations regarding immunity from 1931 to 1945, when it abducted young women and charged Japanese soldiers money for their violation, cannot possibly have been colored by a Treaty signed years later.

2. Respondent next purports to distinguish *Altmann* based on the fact that *Altmann* involved the expropriation exception to sovereign immunity, while this case involves the commercial activity exception. Brief in Opposition at 18. The FSIA lists seven "[g]eneral exceptions to the jurisdictional immunity of a foreign state." 28 U.S.C. § 1605(a)(1)-(7). Petitioner can think of no reason why some, but not all, of these exceptions to sovereign immunity should apply retroactively, and Respondent offers none.

Respondent cites the Ninth Circuit's discussion of the "*Bernstein* letter" in support of this purported distinction.[3] Brief in Opposition at 18-19. However, as Respondent acknowledges, the *Bernstein* letter is simply irrelevant, as it "concerned the act of state doctrine, not the doctrine of sovereign immunity." *Id.* at 19 n.8 (citations omitted).

Moreover, the *Bernstein* letter echoed a series of declarations, referred to in the Bernstein letter itself, that were directed at *all* enemy nations, including Japan. For example,

---

[3]Portions of this letter, but not the whole, are reprinted in *Bernstein v. N.V. Nederlandsche-Amerikaansche,* 210 F.2d 375 (2d Cir. 1954).

the "*Declaration Regarding Forced Transfers of Property in Enemy Controlled Territory*," 8 Dep't State Bull. 21 (Jan. 9, 1943), was "a formal warning" to all enemy nations, including Japan, that the Allied countries

> intend to do their utmost to defeat the methods of dispossession practiced by the governments with which they are at war against the countries and peoples who have been so wantonly despoiled . . . [and] reserve all their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect of the governments with which they are at war.

Id. at 21-22. The fact that this policy, targeted at all enemy nations, was cited in a letter provided to the plaintiffs in a case involving Germany does not limit the application of the underlying policy to Germany.[4]

---

[4]The State Department issued additional warnings specifically addressing Japan's conduct, condemning Japan's treatment of noncombatants, warning that the United States would hold perpetrators personally and officially responsible, and specifically condemning rape and pandering. *See, e.g.*, 5 Dep't State Bull. 476 (Dec. 13, 1941); 10 Dep't State Bull. 277 (Mar. 25, 1944); 5 Dep't State Bull. 470 (Dec. 13, 1941); 8 Dep't State Bull. 49-55 (Jan. 16, 1943); 6 Dep't State Bull. 123 (Feb. 6, 1942); 6 Dep't State Bull. 169 (Feb. 21, 1942); 8 Dep't State Bull. 337 (Apr. 24, 1943); 10 Dep't State Bull. 115 (Jan.

3. Finally, Respondent notes that Austria adopted the restrictive theory of sovereign immunity prior to 1952. Brief in Opposition at 19. As Respondent concedes, however, "foreign law . . . has never been relevant in determining whether a foreign sovereign is entitled to immunity in *this* country." *Id.* (emphasis in original). Respondent thus relies, as it did with the *Bernstein* letter (which Respondent concedes is irrelevant to the issue of sovereign immunity), on a purported distinction even Respondent apparently finds unconvincing.

In order to prevent inconsistency between the application of the FSIA here and that in *Altmann*, the Court should either grant the Petition or hold it pending the Court's decision in *Altmann*.

II. RESPONDENT MISCHARACTERIZES, AND FAILS TO ADDRESS, THE SECOND QUESTION PRESENTED BY PETITIONERS.

The second question presented in the Petition is, "Even absent the FSIA, are enemy nations entitled to sovereign immunity from suits based on their wartime acts, particularly when those acts occur on United States soil?"

Since the doctrine of sovereign immunity was first announced in *The Schooner Exchange v. M'Faddon,* 11 U.S. 116 (1812), the Court has repeatedly referred to the immunity enjoyed by "friendly" foreign sovereigns in American courts.

29, 1944); 10 Dep't State Bull. 340 (Apr. 15, 1944); 10 Dep't State Bull. 342 (Apr. 15, 1944).

See The Schooner Exch., 11 U.S. at 145-46; *see also Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983); *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34-36 (1945); *Ex parte Republic of Peru*, 318 U.S. 578, 587-89 (1943). It is therefore questionable whether, prior to passage of the FSIA, enemy nations had any reasonable expectation of immunity from suit.[5] Indeed, the Second Circuit recently expressed doubt that the doctrine of sovereign immunity should apply to suits based on wartime conduct by enemy nations. *See Abrams v. Société Nationale des Chemins de Fer Français*, 332 F.3d 173, 187 (2d Cir. 2003); *see also Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1179 (D.C. Cir. 1994) (Wald, J., dissenting); *Flota Maritima Browning de Cuba, S.A. v. Motor Vessel Ciudad de la Habana*, 335 F.2d 619, 623 n.10 (4th Cir. 1964) (noting authority for inapplicability of immunity doctrine to unfriendly powers). *Cf. Johnson v. Eisentrager*, 399 U.S. 763, 769 (1950) (law recognizes distinction between friendly and enemy aliens).

Rather than address this issue, Respondent constructs a straw man and knocks him down with a flourish. Respondent conspicuously ignores the Petition's discussion of whether enemy nations should be afforded the same immunity as friendly nations and somehow surmises that Petitioner actually seeks to convince the Court to adopt a *jus cogens* exception to sovereign immunity. *See* Brief in Opposition at 20-21. Respondent's failure to address the real question presented is telling.

---

[5]After all, "foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *Verlinden*, 461 U.S. at 486.

As the Second Circuit reasoned in *Abrams*, "[T]he State Department's treatment of ordinary litigation with friendly foreign states in times of peace does not necessarily indicate the position the Department would have taken on claims closely related to war-time crimes of an enemy." *Abrams*, 332 F.3d at 187. Nor does anything in this Court's jurisprudence indicate that prior to passage of the FSIA, enemy nations would have received the same immunity from suit as friendly nations. Indeed, the Court's frequent reference to the immunity from suit traditionally afforded "friendly" nations implies to the contrary.

To the extent the Court entertains any doubt that the FSIA applies to cases arising from pre-1952 conduct, the Court should grant the Petition to address the important and unresolved question whether, absent the FSIA, enemy nations are entitled to sovereign immunity. In the alternative, because the Court's decision in *Altmann* will likely implicate this question, the Court should hold the Petition pending its decision in *Altmann*.

III. THE COURT SHOULD DECLINE RESPONDENT'S INVITATION TO REACH ISSUES NOT ADDRESSED BY THE COURT OF APPEALS.

Respondent alleges various alternative grounds on which the decision below could purportedly be affirmed.[6]

---

[6] The D.C. Circuit did not hold, as Respondent appears to imply, that outside the sovereign immunity context the San Francisco Treaty "provides an independent basis for dismissal." Brief in Opposition at 18. Because treaties can extinguish only

Brief in Opposition at 20. For reasons briefed at length by Petitioners below, each of these grounds is wholly without merit. The Court "ordinarily do[es] not decide in the first instance issues not resolved below," *Pierce County v. Guillen,* 537 U.S. 129, 148 n.10 (2003), and Respondent suggests no reason why an exception should be made here. If the Court agrees with Petitioners that the court of appeals erroneously applied the doctrine of sovereign immunity to bar Petitioners' claims, the courts below can, on remand, address Respondent's other asserted bases for dismissal.

Moreover, Respondent repeatedly confuses the FSIA's grant of jurisdiction with the substantive law of liability. The FSIA, unlike False Claims Act at issue in *Hughes Aircraft Co. v. United States,* 520 U.S. 939 (1997), relied upon by Respondent, does not provide a substantive cause of action. Trafficking in women was illegal, and a violation of international law, at the time Japan established "comfort stations" all over Asia and on U.S. soil, and it remains illegal today. *See, e.g. International Convention for the Suppression of the White Slave Traffic*, May 4, 1910; *Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, G.A. Res. 55/25 Annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, at Art. 3 (2001); White Slave Traffic (Mann) Act, Pub. L. No. 277, § 395, 36 Stat. 825 (1910); Victims of Trafficking and Violence Protection Act of 2000, 22 U.S.C. § 7101.

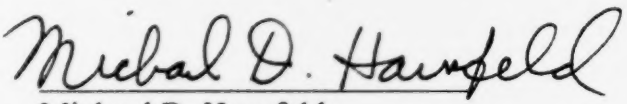
---

the claims of signatory nations and their citizens, the Treaty cannot, and does not, bar plaintiffs' claims. *See Flores,* 343 F.3d at 162; *Yousef,* 327 F.3d at 95 n.28.

CONCLUSION

For the foregoing reasons, and those presented in the Petition, the Court should grant certiorari on each of the two questions presented by the Petition. In the alternative, the Court should hold the Petition pending decision of the closely related question on which the Court granted certiorari in *Altmann*.

Respectfully submitted,



Michael D. Hausfeld
Counsel of Record
Richard A. Koffman
Agnieszka M. Fryszman
COHEN MILSTEIN HAUSFELD & TOLL, P.L.L.C.
1100 New York Avenue, N.W.
Suite 500 West
Washington, D.C. 20005
(202) 408 - 4600

Barry A. Fisher
David Grosz
FLEISHMAN & FISHER
1888 Century Park East
Suite 1750
Los Angeles, CA 90067

Bill Lann Lee
Morris A. Ratner
Scott Nealey
LIEFF CABRASER HEIMANN & BERNSTEIN
275 Battery Street, 30th floor
San Francisco, CA 94111

David R. Markham
BLUMENTHAL OSTROFF & MARKHAM
2255 Calle Clara
La Jolla, CA 92037

Kenneth T. Haan
HAAN & RYU, L.L.P.
3699 Wilshire Blvd., Suite 860
Los Angeles, CA 90010

Keith K. Kim
LAW OFFICES OF KEITH KIM
3699 Wilshire Blvd., Suite 635
Los Angeles, CA 90010

Johnnie L. Cochran, Jr.
LAW OFFICES OF JOHNNIE L. COCHRAN, JR.
Woolworth Building
233 Broadway
New York, NY 10279